SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 124.

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122; PHIL L. VALLEY, JOHN ALEXANDER and JACK HEISDORF, Each Individually, as Business Agent, Organizer, and Vice-President, Respectively, for, and as Representatives of, All the Members of Hotel & Restaurant Employees' International Alliance No. 122;
INTERNATIONAL LAUNDRY WORKERS, LOCAL NO. 174;
BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL NO. 64, sometimes Known as International Bartenders and Beverage Dispensers, Local No. 64;
INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL NO. 311;
MILWAUKEE BUILDING TRADES COUNCIL;
All Affiliated With the American Federation of Labor,
Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, Individually and as Chairman of, L. E. GOODING, Individually and as a Member of, R. FLOYD GREEN, Individually and as a Member of, the Wisconsin Employment Relations Board;
PLANKINTON HOUSE COMPANY, a Corporation,
Respondents and Appellees.

REPLY BRIEF

In Support of Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin.

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SUPREME COURT OF THE UNITED STATES.

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No. 124.

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122; PHIL L. VALLEY, JOHN ALEXANDER and JACK HEISDORF, Each Individually, as Business Agent, Organizer, and Vice-President, Respectively, for, and as Representatives of, All the Members of Hotel & Restaurant Employees' International Alliance No. 122;
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MILWAUKEE BUILDING TRADES COUNCIL;
All Affiliated With the American Federation of Labor,
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WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, Individually and as Chairman of, L. E. GOODING, Individually and as a Member of, R. FLOYD GREEN, Individually and as a Member of, the Wisconsin Employment Relations Board;
PLANKINTON HOUSE COMPANY, a Corporation,
Respondents and Appellees.

REPLY BRIEF

In Support of Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin.

To the Honorable the Justices of the Supreme Court of the United States:

While under ordinary circumstances a reply brief is not necessary, petitioners have deemed it advisable to file one in view of special circumstances in this case, occurring since the original brief was filed.

These special circumstances are as follows:

i. The Circuit Court for Milwaukee County, which originally enforced the orders of the Wisconsin Employment Relations Board in the instant case, has since in contempt proceedings brought by the Wisconsin Employment Relations Board, found the petitioners in contempt of court for violations of the order.

ii. Since rendering the decision in the instant case the Supreme Court of the State of Wisconsin has rendered two additional decisions relating to labor disputes, which cast light on that court's attitude in such matters, and demonstrate the necessity for issuance of a writ in the instant case.

iii It is apparent from the brief filed by the Attorney-General of the State of Wisconsin in opposition to the petition for writ of certiorari that justification for the Wisconsin Supreme Court's decision is based upon a subsequent decision of this Court in the case of **Milk Wagon Drivers' Union of Chicago, Local 753, et al. v. Meadowmoor Dairies, Inc.**, 61 Sup. Ct. 552, although the principles therein expressed did not constitute the basis for the order of the Wisconsin Employment Relations Board.

ARGUMENT.

At the outset petitioners want to make their position clear to this Court. Their sole interest lies in preserving for themselves and for organized and unorganized workingmen in the State of Wisconsin the right to peacefully picket when engaged in a dispute or controversy with either the employer or with other employees or groups of employees. The decision of the Wisconsin Supreme Court in this case, as well as its decisions in subsequent cases, clearly indicate that such rights are being denied and will continue to be denied by the Wisconsin courts unless some clear-cut statement is made by this Court with respect to the devices relied upon to effectually prohibit the right of peaceful picketing in the State of Wisconsin.

The Attorney General of the State of Wisconsin in his brief opposing granting of a writ of certiorari has made comment of the fact that in our original brief in support of the petition we went outside of the record to refer to the contempt proceedings which were then pending in the Circuit Court.

It is true that the contempt proceedings are not now properly before this Court. However, it is not possible to present the contempt proceedings contemporaneously with the petition for writ of certiorari because of the obvious delay which will be experienced in appealing from the contempt judgment to the Supreme Court of the State of Wisconsin, and, if upheld, to this court. We therefore take the liberty of appending hereto the findings of fact and conclusions of law in that contempt proceeding, not for review by this Court, but as representing persuasive argument in support of our contention that the right of free speech has been denied to these petitioners, and in support of the petition for writ of certiorari.

Similarly, the decisions of the Wisconsin Supreme Court in the cases of **Carpenter Baking Company v. Bakery Sales Drivers Local Union No. 344 et al.** (not yet officially reported), and **Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers and Dairy Employees' Union, Local No. 225, etc.** (not yet officially reported), are not matters which are properly before this Court for review. Copies of those decisions, however, are appended hereto, again for the purpose of enabling this Court to ascertain the treatment which the Wisconsin Supreme Court has given to picketing in labor controversies and the manner in which that court has sought to distinguish its decisions from the otherwise persuasive decisions of this Court in the cases of **Senn v. Tile Layers' Protective Union**, 301 U. S. 468; **Lovell v. Griffin**, 303 U. S. 444; **C. I. O. v. Hague**, 307 U. S. 196; **Schneider v. State**, 308 U. S. 147; **Thornhill v. Alabama**, 310 U. S. 88; **Carlson v. California**, 310 U. S. 106; **Milk Wagon Drivers' Union of Chicago, etc., v. Meadowmoor Dairies, Inc.**, 61 Sup. Ct. 552, and **American Federation of Labor v. Swing**, 85 L. Ed. (Adv. Op.) 512.

THE CONTEMPT PROCEEDINGS.

In our opinion the findings of fact and conclusions of law of the Circuit Court for Milwaukee County in the contempt proceedings speak for themselves. We do point out briefly, however, that the Circuit Court for Milwaukee County found these petitioning unions in contempt of the order which the unions have petitioned this Court to review, for having engaged in the conduct enumerated in paragraphs XII, XVIII and XX of the findings of fact (Appendix, pages 13, 16, 20).

Paragraph XII sets forth conduct which constitutes peaceful picketing in every sense of the word. Paragraph XVIII relates to the picket line as being intimidatory and coercive.

In paragraph XX the finding is made that the functioning of the Milwaukee Federated Trades Council and the Wisconsin State Federation of Labor, through which the support of the public was solicited, constituted merely an extension of the picket line referred to in paragraph XVIII. Certainly, the interpretation of the extent of the order by the Circuit Court is more persuasive than any argument which the Attorney-General may make.

In paragraph XXVII (Appendix, page 23) the Court found that all of the activities set forth in the findings of fact, which included not only the peaceful picketing at or near the premises, but display of placards in other parts of the city, the carrying of signs on moving vehicles in other parts of the city, the writing of letters, and the persuasion of others not to use the hotel facilities, "when weighed in the light of all the circumstances and the real nature of the methods employed, have materially exceeded the bounds of peaceful picketing, persuasion or advertising."

In finding of fact XXVIII (Appendix, page 24) the Circuit Court makes the finding that "in all probability violence, threats, force, coercion and intimidation will be engaged in at any time that conditions are favorable thereto." This finding is made almost two years after the last occurrence of violence on the picket line at the inception of the strike. There has been absolutely no violence of any kind since that time.

Additionally, the afore referred to findings answer very eloquently the argument made by the Attorney-General at pages 33 and 34 of the State's brief that the obvious remedy of these petitioners is to apply to the Circuit Court of Milwaukee County for modification of the decree. The Circuit Court for Milwaukee County has already an-

ticipated any such action by making finding XXVIII (C), afore referred to.

The last act of violence was found to have occurred on November 17, 1939. Nevertheless, on August 2, 1941, almost two years later, the Court to which we are directed to apply for relief made the finding that "in all probability violence, threats, force, coercion and intimidation will be engaged in at any time that conditions are favorable thereto." Yet careful examination of all the other findings of fact made by the Court demonstrates conclusively that there is absolutely no basis for such finding. The fact is that there has not been one instance of violence, threats, force, coercion or intimidation since November 17, 1939. The only apparent basis for this finding of the Court is the Court's adoption of the Attorney-General's theory that peaceful picketing, the establishment of a picket line of not more than two or three pickets, and the making of oral or written requests to gain the support of other labor organizations or the public generally, constitute coercion or intimidation. Certainly this theory of the Court pleads more persuasively than any argument we can make for the granting of the writ and the reversal of the decision.

What is also of special interest in the contempt proceeding is the fact that the Circuit Court in findings XXIV through XXVII (Appendix, pages 21-23), in ascertaining whether or not the order has been violated, has made findings as to purported illegal objectives of the picketing and boycotting—a matter which enters this case for the first time in the contempt proceeding.

This question has never been raised before, was not litigated in the original proceedings at any stage thereof, and played absolutely no part in the previous decisions of the Wisconsin Employment Relations Board, the Circuit

Court for Milwaukee County, and the Supreme Court of the State of Wisconsin. It is an attempt, in our opinion, to rely upon the subsequent decision of the Wisconsin Supreme Court in the case of **Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers' Union, Local 225 et al.**, which decision is set forth in the appendix hereto.

These findings by the Circuit Court as to the purported illegal objective, following the lead of the Wisconsin Supreme Court in the above referred to case, constitute another persuasive reason why this Court should grant the petition for certiorari and terminate once and for all these specious attempts to override the decisions of this Court and the Constitution of the United States.

SUBSEQUENT DECISIONS OF WISCONSIN SUPREME COURT.

The decision of the Wisconsin Supreme Court in the case of **Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers and Dairy Employees' Union** speaks for itself. In connection with that case we desire to specifically point out that the Wisconsin Supreme Court determined that the activities of the union were invalid under a judgment which it construed as banning all picketing, upon the grounds that:

a. The picketing was for the purpose of compelling the employer to commit an illegal act, that is, to sign a closed shop agreement which was not approved by 75 per cent of the employees in a secret referendum conducted by the Wisconsin Employment Relations Board;

b. That such picketing was subject to restraint no matter at whom directed. (The case clearly involved a controversy between employes.)

c. Picketing, while not violent, was, nevertheless, coercive, and, therefore, subject to restraint.

d. The legality of the picketing is measured by its effect upon the employer.

e. In effect there can be no picketing in furtherance of employer-employee disputes.

f. The purported applicability of the **Meadowmoor** case, although the record in this case is devoid of violence.

Inasmuch as the decision in the case of **Carpenter Baking Company v. Bakery Sales Drivers' Local Union No. 344 et al.**, set forth in the appendix hereto, is not accompanied by an opinion (the equal division of the court, one of the justices being ill and not participating, resulting in affirmance of the judgment appealed from) no specific comment can be made other than to point out that the judgment appealed from, among other things, prohibited the union, its officers, agents, servants, and employees

"• • • (3) From inciting or attempting to persuade persons not to deal with the plaintiff or the plaintiff's employees or with retail dealers offering plaintiff's products for sale."

There was no violence involved in that case. The Circuit Court of Milwaukee County, in issuing its injunction, stated in its decision:

"Upon the facts submitted in this case, there can be no finding made that a labor dispute has at any time existed as between the plaintiff and its employees. • • • It is understandable, therefore, that when it was proposed on several occasions that the employees organize, they saw no necessity for it, and declined to join the Union of their own volition. I, therefore, find and decide that at no time has a labor dispute, as that term is defined in section 111.02, subsection (8), existed."

[Section 111.02 (8) reads as follows:

"The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process of details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute."]

"It clearly appears that the acts complained of, which are established in the evidence in this case, are prohibited by the statutes, which declare (Section 111.06) 'It shall be an unfair labor practice for an employe, individually or in concert with others: * * * (e) To co-operate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.' * * *

"The plan as carried out definitely offends against the provisions of subsection (e) of section 111.06, paragraph (2), for it calls for a co-operation of a number of members of the union to engage in, promote or induce picketing, boycotting, or other overt act. In the language of the statute, this conduct is declared to be an unfair labor practice. * * *

"I believe that all of the matters which are urged by the defendants, challenging the constitutionality of the statutes in question, are decided in the case of **Hotel & Restaurant Employees' International Alliance, Local No. 122, et al. v. Wisconsin Employment Relations Board et al.** * * *"

That Court also found in its findings of fact:

"Eighth: That the defendants have co-operated together in engaging in, promoting and inducing the boycotting of the bakery products manufactured for sale by the plaintiff and sold by employees of the plaintiff, all contrary to the provisions of Section

111.06 (2) (e), Wisconsin Statutes, and, in furtherance of the purpose of such combination, the defendants have adopted means and engaged in conduct intended and reasonably calculated to coerce and intimidate plaintiff's employes while performing their usual and ordinary services for the plaintiff.

"Ninth: That on the 12th day of August, 1940, and each day subsequent thereto, defendants Elmer Johnson, Joseph Reichartz, Gilbert Schlechta and G. McMicken, while acting for and on behalf of the above-named defendant labor union, and in furtherance of the common purpose of said defendants hereinbefore mentioned, persistently followed plaintiff's delivery trucks about the City of Milwaukee while said trucks were being used to deliver bakery products to retail dealers in the City of Milwaukee, and when plaintiff's bakery sales drivers stopped such delivery trucks in the vicinity of such retail dealers' places of business said defendants entered such places of business and requested and encouraged plaintiff's customers to discontinue purchasing bakery products from the plaintiff, and represented to such customers that there was labor trouble at plaintiff's plant, and said defendants also walked about plaintiff's delivery trucks and such customers' places of business carrying signs and placards containing the following legend: 'This Carpenter Baking Co. employee is not a member of Bakery Sales Drivers' Union, Local 344. Please do not patronize.' "

That Court also found as conclusions of law:

"First: That the acts of the defendants constitute unfair labor practices within the meaning of the term 'unfair labor practice' as defined by Section 111.06 of the Statutes of the State of Wisconsin.

"Second: That no labor dispute exists between the plaintiff and defendants as defined in Section 111.04 of the Statutes of the State of Wisconsin.

"Third: That the provisions of Chapter 111 of the Statutes of the State of Wisconsin are valid and con-

stitutional enactments and do not violate the constitutional guaranty of freedom of speech."

[Section 111.06 (2) (e) is that section of Chapter 111 of the Wisconsin Statutes which was considered by the Wisconsin Supreme Court in the instant case, and which is challenged by the petitioners herein as being unconstitutional and void.]

By virtue of the decisions afore referred to there has now arisen in the State of Wisconsin a situation which directly challenges and threatens the rights of working men, organized and unorganized, to publicize their grievances and their opinions with respect to matters growing out of the employment relationship, and to enlist the support of the public in furthering their own interests. It is for that reason that it is a matter of great urgency that this Court grant the petition for writ of certiorari, and make it clear that this Court's previous decisions, above referred to, have equal applicability in the State of Wisconsin as well as in the other states in the Union.

THE BRIEF OF THE ATTORNEY-GENERAL.

The brief of the Attorney-General on certiorari attempts to reduce all of the momentous issues in this case to one simple conclusion, namely, that the Wisconsin Supreme Court in the case at bar and on rehearing has done nothing more than to hold that the courts in Wisconsin have jurisdiction and the power to issue injunctions which prohibit violence.

That is an attempt to camouflage and conceal the true issues of the case. The right of the State of Wisconsin to enjoin violence was not put in issue by petitioners at any time in the proceedings from the time they were commenced before the Wisconsin Employment Relations Board to their termination in the Supreme Court of the state.

We pointed out most clearly that we did not challenge the right of the Board or the Court to issue an injunction restraining violence. We further pointed out that there was no need of a statute such as the Employment Peace Act to impose such jurisdiction in the Wisconsin courts. We pointed out, too, that the affirmation of such jurisdiction in the Employment Peace Act as set forth in Sections 111.06 (2) (f) (g) and (j) were not challenged, and that these sections were not in issue. What we did point out and which is the fact in this case was that the Wisconsin Employment Relations Board based its right to issue this injunction on section 111.06 (2) (e), and that this section synchronizes with section 111.02 (8), defining a labor dispute as

> "• • • any controversy between an employer and the **majority of his employees** in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute." (Emphasis ours.).

It is strange, indeed, that the Wisconsin Supreme Court should have found it necessary to discuss in great detail "unauthorized strikes" as constituting unfair labor practices and assert most conclusively that engaging in promotion of picketing in furtherance of an unauthorized strike was a violation of section 111.06 (2) (e), and that, therefore, the cease and desist order is valid (Supp. Record p. 56). Surely the Wisconsin Supreme Court could not make so definite and conclusive a finding and then say that it made such holding not to deny these petitioners of their right of free speech, but that such right was denied because there has been some violence on the picket line.

The subtlety of such combination in the construction of patently unconstitutional enactments and the poisonous

effects thereof become manifest when trial courts come to pass upon the peaceful activities of workers in furtherance of their dispute on the basis of such construction by the Wisconsin Supreme Court of the Employment Peace Act. As it appears from the appendix hereto, the trial court in this case in contempt proceedings brought because of alleged violations of the original order has found union officials guilty of contempt for engaging in peaceful activities.

On the basis of the subtle construction of 111.06 (2) (e) another trial court in the **Carpenter Baking Company** case, referred to herein, held that there was no labor dispute under section 111.02 (8) because a majority or all of the employees failed to authorize a strike, and that court, therefore, enjoined picketing because of claimed violation of section 111.06 (2) (e), which makes such picketing and boycotting an unfair labor practice, when not approved by a majority of the employees in a secret ballot. This latter holding by the Circuit Court for Milwaukee County has been affirmed by the Wisconsin Supreme Court in a divided opinion. (See appendix.)

Thus the simple formula, so naively presented by respondents in their subtle attempt to exclude what the courts have truly conceived to be the issue and truly held in these cases, is exposed as wholly fallacious by the very application by the trial courts of the principles enunciated by this Court in the cases before them, and which application the Wisconsin Supreme Court affirmed.

We repeat that violence and the right to enjoin it was not the issue in this case, and we repeat most emphatically that the Board's decision was not premised on that issue. We again point out that if the Board's order and the original order of the Circuit Court enforcing such order were premised upon a finding that the peaceful activities were

so enmeshed with violence that it could be honestly and reasonably held that future peaceful activities would also engender violence, then the Circuit Court for Milwaukee County certainly would not have permitted continuation of such peaceful activities pending the appeal to the Wisconsin Supreme Court.

It is regrettable that the **Meadowmoor** decision of this court has been utilized by justices who have refused to accept the principles pronounced in the Norris-La Guardia Act and in the **Swing** case, or who have sought to construe statutes to death for the purpose of overcoming and defeating the decisions of this court in the **Thornhill, Carlson** and **Swing** cases.

In fact, justices with a clearer vision and a more ready desire to accept the United States Supreme Court pronouncements have had occasion to direct the attention of their brethren of such aptitude to misapply the **Meadowmoor** case. Justice Lehman, Chief Justice of the New York Court of Appeals, in **Opera on Tour, Inc., v. Weber**, 34 N. E. (2d) 349 (N. Y.); Justice Farthing of the Illinois Supreme Court in **Ellingsen v. Milk Wagon Drivers Union of Chicago, Local 753**, 35 N. E. (2d) 349 (Ill.), and **2063 Lawrence Avenue Building Corporation v. Gust Van Heck**, 35 N. E. (2d) 373 (Ill.).

The writer of the decision in the case of **Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers Local 225**, copy of which is appended hereto, vigorously dissented in the earlier Wisconsin cases of **American Furniture Company v. I. B. T. C. S. & H. of A.**, 222 Wis. 338, and **Senn v. Tile Layers' Union**, 222 Wis. 383, subsequently affirmed by the United States Supreme Court in 301 U. S. 468, and now sees in the **Meadowmoor** case the opportunity to evade the holding of this Court in the **Senn** case, and to substitute his own view as expressed in his dissents.

Unless the justices so disposed not to follow the decisions of the United States Supreme Court are curbed in their predilections, the Norris-La Guardia Act and other prototypes will suffer the same fate as did the Clayton Act. This Court only recently had occasion to make known to the courts of the states of New Jersey, Illinois and New York that they must be bound by the interpretations of the United States Constitution placed on it by the United States Supreme Court (**Miller v. Journeymen Tailors' Union**, 61 Sup. Ct. 632; **American Federation of Labor v. Swing**, 61 Supr. Ct. 568; **Wohl and Platzman v. Bakery & Pastry Drivers & Helpers' Local 802**, 85 L. Ed. [Adv. Op.] 998). We repeat that it is regrettable that after the plain and clear decisions of this court in the **Senn, Thornhill** and **Carlson** cases it should, nevertheless, have become necessary to reverse the New York Court of Appeals in the **Platzman** case, the New Jersey court in the **Miller** case, and the Illinois court in the **Swing** case. In our opinion this demonstrates a reluctance on the part of many state courts to accept the principles enunciated by this Court when the acceptance of such principles means that their own economic predilections must give way.

In the brief of the Attorney-General of the State of Wisconsin, opposing the granting of the writ of certiorari in the instant case, it is asserted that the decision of this Court in the case of **Milk Wagon Drivers' Union of Chicago etc. v. Meadowmoor Dairies, Inc.**, 61 Sup. Ct. 562, is completely controlling and constitutes complete justification for the judgment appealed from.

It is interesting to note in the first instance that the **Meadowmoor** case was decided approximately eleven days after the Wisconsin Supreme Court rendered its decision on the motion for rehearing in the instant case.

It is claimed that the Wisconsin Employment Relations

Board, in applying the statute (Section 111.06 (2) (c), and the Circuit Court and the Supreme Court of the State of Wisconsin anticipated correctly this Court's holding in that case. The fact is that the Wisconsin Employment Relations Board did no such thing. We again invite careful reading of the decision, findings of fact, conclusions of law, and order of the Wisconsin Employment Relations Board (R. 251-270), and challenge the assertion of the Attorney-General that such board anticipated the **Meadowmoor** case in coming to its determination.

The fact is that the order entered by the Board is not based in any way upon a finding or claim that the few isolated acts of mild disorder which took place the first few weeks of the strike so characterized the activities of the unions that the Board, in the exercise of its judgment, determined to prohibit all activities. It is further apparent that the Board made no finding that these few isolated acts of disorder were such that it "could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful" (**Milk Wagon Drivers' Union of Chicago etc. v. Meadowmoor Dairies, Inc.**, supra).

While it is true that both the Circuit Court and the Supreme Court of the State of Wisconsin made reference in their decisions to the acts of violence, the fact remains that neither the Circuit Court nor the Wisconsin Supreme Court had any jurisdiction other than to enforce the order of the Board. The determination of whether or not an order should be entered and the reasons for entering such order rested with the Board in the first instance.

In this connection it is interesting to note that the Wisconsin Supreme Court in the case of **Allen Bradley Local 1111 etc. v. Wisconsin Employment Relations Board**, 237 Wis. 164, 295 N. W. 691, in dealing with the powers and authority of the board, pointed out:

> "As already stated, the manner and extent to which the act shall apply in a particular case pending before it is committed to the discretion of the board."

In the instant case the Board did not exercise its discretion to issue a restraining order on the basis of the principles enunciated in the **Meadowmoor** case.

As we understand the decision of this Court in the **Meadowmoor** case the only justification for the entry of an order prohibiting all picketing (the order in the instant case prohibits boycotting also) must lie in the express finding of acts of extreme violence, which are so enmeshed with the peaceful, legitimate activities that the trier of fact can come to the reasonable conclusion, supported by facts, that such complete ban is warranted in the exercise of the honest discretion by the trier of fact.

In the instant case the Wisconsin Employment Relations Board did not come to such conclusion, nor did it in any way seek to justify its conclusion on that basis. Any attempt, therefore, on the part of the Supreme Court of the State of Wisconsin to subsequently justify such order, by substituting its own findings of fact or by misinterpreting and rewriting the order to conform to the **Meadowmoor** case must be rejected as an effort to accomplish a result which cannot be otherwise justified.

As we pointed out in our original brief, in support of the petition for writ of certiorari, this Court does have jurisdiction to issue a writ of certiorari to a state court where any device used to support the decisions is "so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent review of the decision on the federal question" (**Leathe v. Thomas**, 207 U. S. 92, 99; **Ohio State Bank v. Bryan**, 282 U. S. 765, 774; **Johnson v. Risk**, 137 U. S. 300, 307).

ASSUMING THAT THE ORDER WHICH PETITIONERS SEEK TO HAVE THIS COURT REVIEW IS BASED UPON AN ATTEMPTED APPLICATION OF THE PRINCIPLES ENUNCIATED IN THE MEADOWMOOR CASE, NEVERTHELESS THE FACTS OF THE CASE DO NOT JUSTIFY APPLICATION OF THOSE PRINCIPLES, AND THE ORDER ITSELF FAR EXCEEDS THE LIMITATIONS SET FORTH IN THE MEADOWMOOR CASE.

As we also pointed out in our original brief, the purported ground for sustaining the order as based upon the **Meadowmoor** case loses complete validity when it is remembered that the Circuit Court, after rendering its decision enforcing such order, permitted the labor organizations to continue picketing **at or near** the Plankinton House pending the appeal (R. 52-57). Certainly if the original order were based upon a finding that the isolated and esoteric acts of violence engaged in were so enmeshed with the peaceful activities that it would be imminently dangerours to permit continued peaceful activities there can be no possible justification for permitting such peaceful activities pending the final determination of the Wisconsin Supreme Court. The Court cannot blow hot and cold at the same time. It cannot say on the one hand that there can be no such thing as peaceful picketing in view of the circumstances, and on the other hand, however, permit peaceful picketing.

Nor does the holding of this Court in the **Meadowmoor** case in any way justify an order which prohibits boycotting whether conducted at or near the premises where a strike is in progress or at any other place. Yet the Attorney General in his brief argues that the only question before this Court relates to the validity of the order

which prohibits picketing at or near the Plankinton House. Certainly that part of the order which prohibits boycotting must also be considered by this Court.

Finally, we desire to point out to this Court that in the brief of the Attorney-General at pages 15 through 19 there is an enumeration of instances of "violence" which, it is insisted, bring this case within the doctrine of the **Meadowmoor** case. In that enumeration counsel goes outside of the findings of fact made by the Board and refers to incidents involving the finding of shingle nails on one occasion, the finding of a stench bomb on another occasion, and broken windows on another occasion. (Objection was duly made to any evidence regarding these incidents [R. 146; 156, 157].) These events were not in any way or in any manner attributable to the union, and the Board, therefore, did not refer to them in its findings of fact. It is, therefore, manifestly unfair for the Attorney-General of the State of Wisconsin to comb the record for the purpose of finding whatever remote unsupported fact he can in order to discredit the union, and in an effort to bring the instant case within the decision of this Court in the **Meadowmoor** case.

Similarly, the Attorney-General emphasizes at page 18 of his brief that a police captain testified to the number of arrests and convictions, but does not inform this Court that this testimony merely summarized the findings which were set forth in detail on pages 15 to 17 of the brief.

Similarly, the activities of the union are referred to as constituting violence, crimes, and misdemeanors, when in fact the proceedings which resulted in fines were civil proceedings for the purpose of collecting a penalty for violation of city ordinances (**Milwaukee v. Johnson**, 192 Wis. 585, 213 N. W. 335).

The fact remains that there were exactly seven incidents which even remotely resembled disorders in a strike involving over 188 employees, three of which incidents occurred on November 4, 1939, two days after the commencement of the strike, and the remainder of which occurred between November 5, 1939, and November 17, 1939 (R. 257-259). The hearing before the Wisconsin Employment Relations Board was held on December 10, 11, 12, 13 and 14, 1939 (R. 9). Note particularly the testimony of the police captain that the police department "has been able to maintain order very, very adequately," and that it had "the situation very well in hand" (R. 197, 198).

It is on the basis of this showing that it is now claimed, although not found by the trier of fact, that the injunction can be supported under the doctrine enunciated by this Court in the **Meadowmoor** case.

Human experience aptly demonstrates that a few fugitive encounters on the picket line in the early stages of a strike can no more be controlled or prevented by responsible leaders or organized labor than can the sun be stopped in its course. The intensity of emotion, the livelihood that is at stake, the desire to protect a job for oneself and one's dependents, inject into strikes and picketing such elements that must of necessity in some cases and in the early days of a strike, when feelings naturally run high, lead to some cases of spontaneous eruption. Surely these are not the activities that this Court meant when it referred to "the momentum of fear generated by past violence."

To penalize workingmen by depriving them of the constitutionally guaranteed right of free speech because of occasional excesses indulged in by co-workers of more volatile emotion (many of which excesses are instigated

or provoked by others, as demonstrated in the reports of the Senator LaFollette Investigating Committee) is indeed to exact a price all out of proportion to the value of the rights at stake.

Respectfully submitted,

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